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Report

drawn up on behalf of the Legal Affairs Committee

on ~~the~~ legal basis and procedures for certain legal acts relating to the
Community's fisheries policy

Rapporteur: Mr M. SCHMIDT

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English Edition

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In its resolution of 16 December 1977, the European Parliament instructed the Legal Affairs Committee

'to examine the legal basis of the proposals put forward by the Commission and the regulations adopted by the Council during 1977 concerning the Community's fisheries policy'

On 23 January 1978 the committee appointed Mr SCHMIDT rapporteur.

The draft report was considered by the committee at its meetings of 22 March and 17 April 1978 and adopted unanimously at the latter meeting.

Present: Sir Derek Walker-Smith, chairman; Mr Geurtsen, vice-chairman; Mr Schmidt, rapporteur; Mr van Aerssen (deputizing for Mr Pucci), Mr Alber, Mr Amadei (deputizing for Mr Radoux), Lord Ardwick, Mr Bangemann, Mr Bouquerel, Lord Brimelow, Mr de Keersmaecker, Mr Fletcher-Cooke, Mr van der Gun, (deputizing for Mr de Gaay Fortman), Mrs Iotti, Mr Jahn (deputizing for Mr Santer), Mr Krieg, Mr Luster, Mr Masullo, Mr Rivierez, Mr Scelba, Mr Schwörer, Mr Shaw, Mr Sieglerschmidt, Mr Spénale (deputizing for Mr Lagorce), Mrs Squarcialupi and Mr Zagari.

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A.

The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution together with explanatory statement

MOTION FOR A RESOLUTION

on the legal basis and procedures for certain legal acts relating to the Community's fisheries policy

The European Parliament,

- having regard to Articles 137, 148 and 155 of the EEC Treaty,
 - having regard to the repeated assurances by the Council and the Commission of their readiness to respect and extend the European Parliament's right to be consulted¹,
 - having regard to Article 190 of the EEC Treaty,
 - having regard to Rule 11 of the Council's provisional Rules of Procedure,
 - having regard to the European Parliament's resolution of 16 February 1978 on the right of the European Parliament to be consulted²,
1. Considers the Commission's and the Council's past practice of, in some cases, proposing or adopting Community acts without specifying the Treaty article on which that act is meant to be based, to be in breach of the Treaty;
 2. Deprecates the fact that a possible requirement to consult the European Parliament has thus been bypassed;
 3. Observes that, in many instances, legal acts have been adopted without the mandatory consultation of Parliament and are hence incorrect from a procedural point of view;
 4. Stresses that it regards the failure to indicate the exact Treaty articles on which a Community act is based as an infringement of an essential procedural requirement for legal acts of the Community;
 5. Calls on the Commission and the Council to make a practice in future of always citing the relevant legal basis of legal acts to enable the European Parliament and the European Court of Justice to verify their legality;

¹ See Commission Memorandum of 30 May 1973 (COM 73/999); minutes of the Council meeting of 24/25 February 1964; Council Communication to the European Parliament of 16 October 1973 (Bull. EP No. 34/73).

² OJ No. C 63, 13.3.1978, p. 33

6. Emphasizes that Article 103 of the EEC Treaty may only be used as a legal basis for short-term measures to remedy situations of acute urgency;
7. Calls on the Council to consult Parliament in all cases of doubt concerning the legal basis of a legal act of the European Community;
8. Calls on the Council and the Commission to settle any doubts about the procedure to be followed in respect of the adoption of a legal act, in agreement with the European Parliament and to introduce appropriate procedural arrangements to that end;
9. Instructs its President to forward this resolution and the report of its committee to the Council and the Commission of the European Communities.

B
EXPLANATORY STATEMENT

I. PROBLEMS

1. After the European Parliament had been consulted by the Council, the Committee on Agriculture drew up a report in December 1977 on a number of Commission proposals for regulations introducing a Community fisheries policy (Doc. 442/77; rapporteur: Mr Corrie). It was pointed out in this report that the European Parliament had not been consulted on a number of regulations on individual matters relating to the fisheries sector adopted in 1977 by the Council on proposals from the Commission. It was also pointed out that several other fisheries regulations under consideration by the Council did not provide for consultation of the European Parliament.

2. The motion for a resolution contained in the report was adopted by the European Parliament on 16 December 1977. In this resolution Parliament instructed the Legal Affairs Committee to examine the legal basis of the proposals put forward by the Commission and the regulations adopted by the Council during 1977 concerning the Community's fisheries policy.

3. During the debate on Mr Corrie's report, Mr Gundelach, Commissioner responsible for fisheries policy, made the following statement¹:

'..... There has been an awful lot of confusion and a bit of a mess in the course of 1977. I personally do not know why we put forward the proposal on Norway pout under an article other than Article 43.

Since we put forward the proposal concerning the herring ban under Article 43, there seems to me to be a lack of logic. But I would like to clarify this situation as far as the Commission is concerned by saying that basic legislation concerning fish conservation, control etc. in the view of the Commission must come under Article 43, and consequently be subject to discussions with Parliament. Once the basic regulations and the more detailed concrete matters of law have been settled, then there may be matters of administration where one will have to find ways of drawing a dividing line between what has to be discussed in Parliament and what is purely executive business. But there is no disagreement that the type of regulations to which you have referred should be presented under Article 43; that must be so in future. I hope the Council will follow us in this direction. Then there may be occasions where one needs to take urgent action to safeguard emergency situations. There, as the Court of Justice has recognized, one can use Article 103, but only for a short period of time. Either the situation and the rule disappear - in which case there is no problem - or the problem continues, in which case one has to transform the emergency measures into more permanent measures and refer to Article 43. I hope by these comments I have settled this part of the legal difficulties

¹ Debates of the European Parliament, Annex No. 224, 15.12.1977, p. 243

in a manner satisfactory to the European Parliament'.

4. The legal basis of a Community act is important from two main points of view.

First, examination of the legal basis used makes it possible to ascertain whether the Community is in fact competent to adopt legislation in a given sector.

Secondly, the procedure by which legislation is to be adopted is determined solely by the specific Treaty articles on which it is based. This is important because the Treaties make no provisions for any procedure which is applicable generally and in the abstract to the adoption of legislation. Since, in particular, the obligation under the Treaties to consult the European Parliament depends entirely on the enabling provisions actually used, it is essential for all Community acts to be referable to one or more specific provisions of the Treaties.

The acts dealt with below will be considered from this procedural point of view.

5. In 1977 the Council adopted 23 regulations on the Community's fisheries policy.

One of these was based on Article 43 of the EEC Treaty and Parliament was accordingly consulted¹. A further 7 were based on Article 103 of the EEC Treaty and the Parliament was not consulted².

Another five regulations were adopted in implementation of existing legislation, notably under Regulation No. 350/77³, which is based on Article 103 of the EEC Treaty.

Finally, the Council adopted 10 regulations containing no reference to a specific legal basis but merely introduced with the following general formula:

'Having regard to the Treaty establishing the European Economic Community'.⁴

¹ Regulation No. 2115/77, OJ No. L 247/77

² Regulation No. 350/77, OJ No. L 48/77; Regulation No. 879/77, OJ No. L 106/77; Regulation No. 1057/77, OJ No. L 128/77; Regulation No. 1417/77, OJ No. L 160/77; Regulation No. 1672/77, OJ No. L 186/77; Regulation No. 1779/77, OJ No. L 196/77; Regulation No. 2899/77, OJ No. L 338/77.

³ Regulation No. 2479/77, OJ No. L 287/77; Regulation No. 2243/77, OJ No. L 260/77; Regulation No. 1673/77, OJ No. L 186/77; Regulation No. 2114/77, OJ No. L 247/77; Regulation No. 2366/77, OJ No. L 277/77;

⁴ Regulations Nos. 1412-1416/77, OJ No. L 160/77; Regulation No. 1709/77, OJ No. L 189/77; Regulations Nos. 2970-2972/77, OJ No. L 351/77; Regulation No. 3021/77, OJ No. L 355/77; see also Regulation No. 341/78, OJ No. L 49/78 and Regulation No. 203/78, OJ No. L 29/78.

6. The Commission has also submitted to the Council a number of other proposals on fisheries policy, similarly based either on the EEC Treaty in general¹ or on Article 43².

7. The regulations adopted so far relate mainly to measures on the management of fisheries resources and the prohibition of fishing for given species in certain Community waters. A number of special provisions have been adopted vis-à-vis certain third countries.

The Commission's proposals relate in particular to catch quotas, measures for the conservation of fisheries resources, measures for quantitative adjustments in the fisheries sector and measures for the control of fishing in Community waters.

8. The aim of the present document is to assess whether the legal bases quoted are appropriate and whether in particular the general reference to the Treaties is admissible in view of the fact that it fails to define the procedure to be used adequately.

II. LEGAL BASIS OF THE EUROPEAN COMMUNITY'S FISHERIES POLICY

9. Article 3(d) of the EEC Treaty specifically mentions the adoption of a common policy in the sphere of agriculture as one of the Community's aims. Pursuant to Article 38(3) and Annex II of the Treaty fisheries products are subject to the provisions of Articles 39-46 of the EEC Treaty, which relate to agriculture. Under Article 40 of that same Treaty, the European Community is required to establish a common organization of agricultural markets, which may include all measures required to attain the objectives set out in Article 39. Under Article 43(2) the Council is empowered and required to make regulations, issue directives or take decisions to that end. Article 43(2) also stipulates that the European Parliament must be consulted.

In addition, Article 102 of the Act of Accession lays down that the Council 'shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea'.

¹ COM(77) 546 final; COM(77) 513 final; COM(77) 515 final; COM(77) 534 final; COM(77) 567 final; COM(78) 6 final; COM(78) 6/2 final; COM(78) 7 final; COM(78) 8 final.

² COM(78) 5 final.

On the basis of these provisions, the European Court of Justice has ruled that the European Community is competent to lay down any measures intended to conserve the biological resources of the sea, including the establishment and allocation of catch quotas for individual Member States and in respect of third countries¹.

The Council has made use of these powers to issue in particular Regulation No. 101/76 laying down a common structural policy for the fishing industry. Article 4 of this regulation reads:

'Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43(2) of the Treaty on a proposal from the Commission may adopt the necessary conservation measures.

In particular, these measures may include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear.'

The Council has thus undertaken of its own volition only to lay down restrictions on catches in accordance with the procedure provided for in Article 43(2) - i.e. after consulting Parliament. This provision in Regulation No. 101/76 has not been amended and is therefore binding on the Council and Commission.

In the event of difficulties in the supply of certain products - which seems to be the case for a number of fish species - the general provisions of Article 103 of the EEC Treaty are also applicable as a basis for legislation. Under that article, the Council may, acting unanimously on a proposal from the Commission, decide upon measures appropriate to the situation and, acting by a qualified majority, issue directives.

10. These legal premises for fisheries policy measures are problematical inasmuch as the decision-making procedures differ in one crucial aspect. Article 43 calls for consultation of the European Parliament, whereas Article 103 of the EEC Treaty or Article 102 of the Act of Accession do not. Thus, as a first step, the order of precedence of these articles must be clarified.

¹ European Court of Justice, joined cases 3, 4 & 6/76 (Kramer) of 14.7.1976, Reports of Cases before the Court 1976, pp. 1279 ff.

11. Fundamentally speaking, the principle of 'specificity' applied in national law holds good also for Community law. On this basis, the most appropriate provisions must be applied in any given circumstances. Comparison of Articles 43 and 103 of the EEC Treaty, of Article 102 of the Act of Accession and Article 4 of Regulation No. 101/76 shows that Article 103(4) of the EEC Treaty applies generally to all products covered by that Treaty in the event of supply difficulties. Article 43 applies specifically to agricultural products and Article 102 of the Act of Accession relates to one particular type of agricultural product (fish). Article 4 of Regulation No. 101/76 contains detailed provisions concerning measures for the conservation of fish stocks. Thus, as regards subject matter, the order of precedence is as follows: Regulation No. 101/76 and in particular Article 4 thereof, Article 102 of the Act of Accession (fish), Article 43 of the EEC Treaty (agricultural products), and Article 103 of the EEC Treaty (all products). However, if supply difficulties are involved, the order of precedence is different. Article 103(4) of the EEC Treaty relates to acute or potential difficulties in the supply of goods, whereas Article 4 of Regulation No. 101/76 and Article 102 of the Act of Accession are concerned with the conservation of fish stocks and, hence, not primarily intended to remedy short-term supply difficulties. Article 43 of the EEC Treaty makes no special provision for shortages.

12. Thus, if we discount implementing measures in respect of legislation previously adopted, it follows that an act containing general provisions on fisheries policy should be based on Article 43 of the EEC Treaty. If such an act relates to measures on conditions for fishing, consideration would first have to be given to basing it on Article 102 of the Act of Accession. However, since its adoption, Regulation No. 101/76 has been the most specific and more recent provision and must therefore be used as the legal basis for restrictions on catches. Where a legal act is concerned with short-term measures to remedy supply difficulties in respect of a given product, Article 103(4) of the EEC Treaty is the appropriate legal basis.

13. Whenever the Commission proposes a legal act, it must ascertain and indicate the relevant legal basis. In case of doubt it should not content itself with a general reference to the Treaties establishing the European Communities, since the legal basis for an act should be specified in the statement of reasons required for all Community legislation (see Article 190 of the EEC Treaty). The European Court of Justice has ruled that this statement of reasons must be sufficiently detailed to allow, for example, the Court to ascertain whether 'the provisions have been applied correctly'¹.

¹ European Court of Justice, Joined Cases 8-11/66, ECR 1967, p. 94

However, it will only be possible to ascertain this where the relevant legal provision has already been indicated. A general reference to the Treaties does not satisfy this requirement because it does not, for instance, make clear what procedure should have been followed. Reference should also be made to the Council's Rules of Procedure (Rule 11), which states explicitly that Council regulations must contain, inter alia, 'particulars of the provisions on the basis of which the regulation was adopted.' The lack of a reference to the Treaty infringes therefore not only Article 190 of the EEC Treaty - and hence an 'essential procedural requirement' within the meaning of Article 173 of the EEC Treaty - but also Rule 11 of the Council's Rules of Procedure. The absence of a reference to a Treaty article does not permit a detailed examination either of the European Community's competence in the matter concerned or of the admissibility of the procedure adopted and therefore constitutes a procedural irregularity¹.

The European Parliament regularly suffers the consequences of this irregularity, as the omission of references to specific articles means, in the majority of cases, that it is not consulted. Parliament therefore has an interest in clarifying this matter with the Council and Commission, and, consequently, it is proposed that a suitable procedure be introduced by the Council, the Commission and Parliament to permit the institutions to reach agreement on the appropriate legal premises for legislation.

III. CONCLUSIONS

14. The following conclusions may be drawn from an application of the above arguments to the regulations on fisheries policy adopted by the Council in 1977.

In cases where the regulations made only general reference to the Treaties and did not specify any precise legal basis the Council, on these grounds alone, did not initiate the procedure for consulting Parliament - even though this may have been necessary. These acts (see above, paragraph 5) do not therefore adequately meet the requirements of Article 190 of the EEC Treaty, which specifies that reasons must be given. A common feature of these ten regulations is that they specify maximum quotas for catches in Community waters by vessels belonging to third countries. Article 4 of Regulation No. 101/76 relates only to vessels belonging to nationals of the Community Member States and cannot therefore serve as a legal basis. Instead, the most likely legal basis is Article 43 of

¹ Further examples of such procedural irregularities of this nature are: Council Regulation No. 3016/77 of 29 December 1977 (Cyprus sherry), OJ No. L 355/77, p. 38; Council Regulation No. 533/78 of 13 March 1978, OJ No. L 74/78, p. 5

the EEC Treaty, since the authorization of fishing by third countries can scarcely be based on Article 103 of the EEC Treaty (measures to eliminate supply difficulties) or primarily on Article 102 of the Treaty of Accession ('conditions for fishing'). Nor does Article 113 of the EEC Treaty (common commercial policy) seem appropriate, as the question of trade in goods is not raised.

15. In cases where Article 103 of the EEC Treaty is used as the legal premise for regulations imposing short-term fishing bans and catch quotas in respect of certain scarce species, the basis in law is doubtful because, while it is true that the goal is the rapid adoption of effective measures to restrict the effects of a particular shortage, recourse should have been had for this purpose to the procedure referred to in Article 4 of Regulation No. 101/76, i.e. the procedure pursuant to Article 43(2) of the EEC Treaty. This is also clear from, for example, the fact that the regulations based on Article 103 are explicitly intended to serve as interim measures until such time as Community rules - again to be based on Article 43 of the EEC Treaty - are adopted for the conservation and management of fisheries resources. It is not, however, permissible to replace a long-term set of rules with a series of short-term measures. Repeated recourse to an article designed for specific short-term emergencies (Article 103(4) of the EEC Treaty) constitutes an evasion of the procedural requirements laid down in the Treaty. This is particularly apparent from the fact that Regulation No. 350/77 of 18 February 1977, which is based on Article 103, was in force for a period of more than nine months, an unusually long time for such a measure. At most, this regulation should have remained in force only until long-term Community legislation covering the same subject-matter had been adopted (see Article 8). In fact, neither the ending of the emergency within the meaning of Article 103 nor the adoption of long-term common rules led to the repeal of Regulation No. 350/77. Instead, it was simply extended on 21 December 1977, again on the basis of Article 103 of the EEC Treaty, by Regulation No. 2899/77. The only reason given for using Article 103 was a reference to the fact that the long-term solution had not been adopted.

It must be pointed out here most emphatically that Article 103(4) of the EEC Treaty states:

'The procedures provided for in this Article shall also apply if any difficulty should arise in the supply of certain products.'

The Council's inability to adopt long-term rules on the basis of what is undisputedly the appropriate legal premise (Article 43) has nothing to do with supply difficulties and therefore in no circumstances justifies decisions based on a clause designed for specific emergencies.

Repeated recourse to Article 103 of the EEC Treaty in order to bring in regulations of restricted duration rather than taking long-term measures thus constitutes an infringement of the procedural requirements laid down in the Treaty.

16. However, where Article 103 was used on the first occasion (i.e. as the legal basis for Regulation No. 350/77) and where implementing measures were taken under the powers contained in this regulation, their legality cannot be called into question.

17. Finally, the comments made under 14 and 15 alone also apply in principle to the Commission's proposals for further legislation. However, a number of proposals require special consideration.

On 16 January 1978 the Commission submitted to the Council a proposal for a regulation establishing a basic system for the conservation and management of fishery resources (COM(78) 5 final), which is correctly based on Article 43 of the EEC Treaty and Articles 102 and 103 of the Act of Accession. Thus, the European Parliament must be consulted on this regulation, which in its turn will form the legal basis for a number of other proposals, including proposals for regulations on the granting of licences with a view to controlling the fishing activities of vessels from Member States of the European Community and from third countries.

There can be no objection to this in itself. However, special consideration should be given to the question of whether an implementing regulation provides a sufficiently broad legal basis for exercising sovereign powers - if only by the authorization of Member States - vis-à-vis vessels from third countries.

IV. SUMMARY

18. In the light of the above, the following summary can be formulated: The Council's practice observed with regard to fisheries legislation - and in other areas - of not basing a legal act on a specific Treaty article is in breach of the Treaties. The European Parliament must insist most emphatically that no further recourse be had to this method in future.

Equally in breach of the Treaties is the practice observed, again in the fisheries sector, of repeatedly basing legal acts on Article 103(4), a provision designed to cater for specific emergencies, instead of adopting long-term rules in accordance with the appropriate procedure. It is appreciated that political problems may make it difficult for the Council to reach a decision. This must not, however, be permitted to have consequences detrimental to a correct procedural approach in drawing up legislation and hence, in the final analysis, to certainty as to what the law is.

To enable any difficulties regarding the time-scale or procedural matters to be settled at an early stage, the European Parliament therefore proposes that a dialogue be initiated - initially limited to procedural questions of this nature - between the institutions with primary responsibility for decision-making in the matter of legislation.

